2006

Salt Lake County v. Utah Labor Commission and Steven A. Alexander : Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SALT LAKE COUNTY, Petitioner/Appellant v. UTAH LABOR COMMISSION and STEVEN A. ALEXANDER, Respondents/Appellees	Case No.20060233-CA Labor Commission No.03-0089 Priority 7

BRIEF OF RESPONDENT STEVEN A. ALEXANDER

PETITION FOR REVIEW FROM ORDER OF THE
UTAH LABOR COMMISSION

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RESPONDENT RESPECTFULLY REQUEST ORAL ARGUMENT AND THAT THIS CASE BE REPORTED.

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This appellate review proceeding arises from the Utah Labor Commission's February 22, 2005, Order awarding Temporary Total and Permanent Partial compensation, medical expenses and attorney's fees arising out of an on-the-job injury. The Utah Court of Appeals has jurisdiction to hear this case pursuant to Utah Code Annotated § 78-2a-3 (2) (a) (1953, as amended), Utah Code Annotated § 34A-2-801 (8) (1997) and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Has Appellant satisfied its obligation on appeal to marshal the evidence in support of the Labor Commission's Order and show that, despite supporting facts and all reasonable inferences that can be drawn therefrom that the Findings are not supported by substantial evidence?

Standard of Review: This is a question of law. The Appellate Courts will not overturn the Commission's factual findings unless they are "arbitrary and capricious," "wholly without cause", or without substantial evidence to support them. Kearns v. Industrial Commission, 713 P.2d 49, 51. (Utah, 1986). Factual findings will not be overturned if based on substantial evidence, even if another conclusion is permissible. Whitear v. Labor Commission, 973 P.2d 982 (Utah App., 1998).

Further, the Utah Administrative Procedures Act, Utah Code Annotated, § 63-46b-16(4)(g) (1988) provides that:

> The Appellate Court shall grant relief only if, on the basis of the agency's record it determines that a person seeking judicial review has

been substantially prejudiced by any of the following:

***

> (g). The agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.

Issue 2: Did Mr. Alexander's injuries arise in the course and scope of his employment with Salt Lake County.

Standard of Review: Generally, "[M]atters of statutory construction are questions of law that are reviewed for correctness." Esquivel v. Labor Commission, 2000 UT 66, 7 P.3d 777 (Utah, 2000). The determination of the issue in this case, however, does not merely involve statutory construction. Rather, the determination requires an application of the terms of Utah Code Annotated, §34A-2-401 (1999) to the particular facts of this case.

The Utah State Legislature has granted the Labor Commission "the full power, jurisdiction, and authority to determine the facts and apply the law. . ." to any adjudicative proceeding before it. Utah Code Ann. §34A-1-301 (1997). When "the governing statute makes an explicit grant of discretion to [an agency, the appellate court] appl[ies] a reasonableness and rationality standard, and may only overturn the [agency's] conclusions of law if they are unreasonable and irrational." Bernard v. Motor Vehicle Division, 905 P.2d 317, 320 (Utah App. 1995).

In workers' compensation cases involving issues of mixed facts and law, the Commission's Findings and Conclusions are entitled to great deference, and its

Conclusions are reviewed under an abuse of discretion standard. That is, whether the Commission overstepped "the bounds of reasonableness and rationality" in making that determination.

Therefore, the Court will not overturn the factual findings in such a workers' compensation case, "unless they are arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence." McKesson Corp. v. Labor Commission, 41 P.3d 468, 473 (Utah, 2002), *quoting from* Large v. Industrial Commission, 758 P.2d 954, 956 (Utah App., 1988).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the injured worker. E. g., State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Preservation for Appeal: Respondent acknowledges that the issue of whether Mr. Alexander's injuries occurred in the course and scope of his employment was raised by Petitioner before the Utah Labor Commission. A Petition for Review was timely filed with this Court.

DETERMINATIVE STATUTE AND RULE

Utah Code Annotated §34A-2-401 (1999) is the applicable statute. It provides in relevant part that workers' compensation benefits shall be paid to:

> An employee ... who is injured ... by accident arising out of and in the course of the employee's employment ...

The Statute is set forth in full in Addendum "A" hereto.

STATEMENT OF THE CASE

Nature of the Case: The Petitioner seeks review of the Utah Labor Commission's Order finding Mr. Alexander entitled to workers compensation benefits as the result of an automobile collision which occurred in the course and scope of his employment.

Course of Proceedings: On January 28, 2003, Mr. Alexander filed an Application for workers' compensation benefits sustained as the result of an industrial injury on November 7, 2001. (R1 at 1). Salt Lake County, his employer, filed an Answer to the Application on February 27, 2003. (R1 at 10-11). Notice of Hearing was sent to all parties on July 1, 2003 setting Mr. Alexander's claim for Hearing on October 23, 2003. (R1 at 12).

On April 16, 2004, Administrative Law Judge Debbie L. Hann entered her Findings of Fact and Interim Order referring the case to a Labor Commission Medical Panel on the issue of the medical cause of Mr. Alexander's right shoulder condition. (R1 at 43-49).

On June 2, 2004, the Medical Panel issued its report finding that there was a "medically demonstrable causal connection between the Petitioner's (Mr. Alexander's) right shoulder condition and the 7 November 2001 industrial accident." The Panel gave him a 3% whole person impairment as a result of that injury. (R1 at 54-67). Neither party filed any objections to the Medical Panel Report.

On February 22, 2005, ALJ Lorrie Lima entered Findings of Fact, Conclusions of Law and Order finding that Mr. Alexander did suffer an injury arising out of and in the course of his employment. She awarded him Temporary Total and Permanent Partial compensation as well as medical expenses, travel allowances, interest and attorneys fees. (R1 at 83-91).

Salt Lake County filed a Motion for Review with the Utah Labor Commission on March 21, 2005 (R1 at 92-154). The Appeals Board of the Utah Labor Commission entered an Order Denying Motion for Review on February 15, 2006. (R1 at 174-179). A full and complete copy of that Order is contained in Addendum "B" herein.

A Petition for Review was filed by Salt Lake County with this Court on March 13, 2006.

Statement of Facts: The relevant facts in this matter are simple, straightforward and not really disputed by the parties. A complete, detailed and largely unchallenged Statement of Facts is contained in the Appeals Board of the Utah Labor Commission's Order Denying Motion for Review, dated February 15, 2006, (R1 at 174-179); *See also*, Addendum "B".

1. On November 7, 2001, Mr. Alexander was employed by Salt Lake County as a Lieutenant in the Salt Lake County Sheriff's Office, (he was, in fact, a 28 year veteran of the Sheriff's Office), where he supervised the Detectives Division. (R3 at 25-26). He was on-call day and night, seven days a week, for investigation of

homicides and other major crimes. (R3 at 27). Even when off-duty, he was required to respond to calls, as well as responding to crimes committed in his presence. (R1 at 83, R3 at 35).

2. As part of his employment, an unmarked Sheriff's vehicle was issued to Mr. Alexander, as well as certain other law enforcement officers, "for use in the performance of their duties." The County policy allowed officers to use their County-owned vehicles for personal travel, subject to some restrictions. (R1 at 36-41). The County provided all fuel, maintenance and repair for the vehicles. A copy of Salt Lake County's Rules and Regulations governing the use and responsibilities for such vehicles is attached hereto in Addendum "C."

3. The County required that its off-duty officers be on 24 hour call and they were required to respond to crimes committed in their presence, police calls and other emergencies. (R1 at 38). Mr. Alexander had actually used his County-owned vehicle several times during off-duty hours to engage in law enforcement activities such as traffic stops and officer back-up. (R3 at 34).

4. Salt Lake County benefited from its policy of assigning County vehicles to certain Sheriff Officers by having an increased number of Officers on the streets, faster response and, in general, increased police availability, including the benefit of sometimes having an unmarked car on the road. (R1 at 45).

5. The Sheriff's vehicle was unmarked but was, nevertheless, fully equipped as a police car with a siren, forward and back deck lights and a police radio that

turned on automatically when the ignition was started. (R3 at 61). The vehicle was also equipped with a loaded M-16 rife, 12 gauge shotgun and Mr. Alexander's personal side arm. (R3 at 32-33). In addition, Officers were required to keep in their vehicles and carry with them at all times, their Sheriff's Officer identification and/or badge, a uniform, citation book, flashlight and flares. (R1 at 37).

6. On November 7, 2001, Mr. Alexander and his wife were northbound on I-15 at 12300 South, in Salt Lake County, in Mr. Alexander's Sheriff's vehicle. (R1 at 83, R3 at 28). Earlier that day, he had driven his wife to a medical appointment and he was now driving her to work in Salt Lake City, and from which he intended to drive to his workplace. (R3 at 35). He was dressed in his work clothes (he is not a uniformed deputy), and had his Sheriff's Office jacket and badge. (R3 at 61).

7. On route to Salt Lake City, on I-15, Mr. Alexander stopped his vehicle due to slow traffic. He quickly observed that the driver behind him would not be able to stop in time to avoid colliding with the rear end of his vehicle. He removed his right hand from the steering wheel and placed it in front of his wife so that she would not hit the dashboard. He kept his left hand on the steering wheel and braced himself for impact. (R3 at 29-30).

8. The other vehicle did forcibly strike with the rear of Mr. Alexander's vehicle and his wife was knocked unconscious and was non-responsive. He called for an ambulance on his Sheriff's vehicle's radio. (R3 at 30).

9. He timely reported the motor vehicle accident to his employer, the County,

and his resulting sore shoulder, which had began to hurt immediately after the collision. (R3 at 36).

10. Following the car wreck, Mr. Alexander's wife had stroke like symptoms caused by a tear in her brain stem. She underwent considerable medical treatment. (R1 at 86, R3 at 38-40).

11. Medical causation of Mr. Alexander's injuries was ultimately not disputed following Labor Commission Medical Panel findings. The Panel noted that there was a medically demonstrable causal connection between Mr. Alexander's right shoulder condition and the November 7, 2001, car wreck. The Panel further found that the treatment Mr. Alexander received for his right shoulder condition subsequent to the accident was reasonable and necessary. (R1 at 87). Neither party filed any Objections to the Medical Panel Report. Accordingly, the nature and scope of Mr. Alexander's medical treatment is not at issue herein and is omitted from this Statement of Facts.

12. The County controlled officers' use of the County's vehicles in several ways. Under the official, written policy (R1 at 36-41, *See also*, Addendum "C") Officers were required to:

(A). Monitor the police radios in their vehicles and respond to law enforcement situations, whether on-duty or off-duty. In fact, the vehicles had been modified so that the police radio automatically came on when the ignition was turned on;

(B). Keep their cars clean, orderly and properly maintained; and,

(C). Carry firearms, police identification, a uniform, flashlight, citation book,

and flares in the vehicle at all times.

13. In addition, the County Policy prohibited Officers from:

(A). Driving their vehicles outside Salt Lake County without prior authorization;

(B). Using the vehicle for any activities inconsistent with the officer's obligation to respond to emergencies;

(C). Allowing anyone other than a Sheriff's Office member to operate the vehicle;

(D). Using their vehicles for recreational or vacation trips;

(E). Using their vehicle if the officer or any passengers had consumed any alcohol within the previous six hours;

(F). Transporting alcohol, except for official business;

(G). Dressing "in any way that could bring discredit to the Sheriff's office, i.e. tank tops, reversed ball caps, earrings, day old beards, etc." While off-duty officers were permitted to have civilian passengers with them, they were not permitted to respond to police calls with such passengers in the car.

(R1 at 36-38, Addendum "C").

SUMMARY OF ARGUMENT

Although the County argues Mr. Alexander was yet not formally on-duty at the time of his automobile accident, the nature of his employment, his 24 hour on-call status, the control that the Employer exercised over his use of the Employer owned vehicle (during formally off-duty hours), together with the benefit which the Employer received from his use of the vehicle, all warrant the award of workers' compensation benefits to him.

The Labor Commission Order granting workers' compensation benefits to Mr. Alexander was reasonable and rational. While this is an issue of first impression for this State, the vast majority of jurisdictions who have considered a similar fact situation have awarded compensation.

ARGUMENT

I

THE WORKERS' COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS AS TO COVERAGE ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.

Few principles of workers' compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977); Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra, first discussed the proper construction of the Workers Compensation Act and the underlying purposes of the

Act, and stated as follows:

> [O]ur statute requires that the statues of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'
>
> * * * * * *
>
> In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to `employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. Id. at 1021-1022. (Emphasis added).

The Labor Commission properly applied this principle and awarded benefits to Mr. Alexander. The Petitioner, however, apparently wants to disregard the preponderance of the evidence and facts and focus on an alarmist claim that:

> The Commission's ruling presents serious liability exposure for any

> employer who allows any employee to operate a work vehicle, no matter on how limited a basis, on personal errands as long as the employee monitors the radio (or listens for the cell phone's ring) or carries work equipment or keeps a utility uniform on board, even for example, when transporting his child and team mates to a game, and regardless of the employee's testimony that he was not engaged in work-related activity at the time of injury. (Petitioner's Brief at 7).

This case, and any ruling which this Court may subsequently enter, will be limited to its fact situation, which is not even remotely similar to the parade of horrors that Petitioner paints. When the facts of this case are reasonably applied to Utah law, let alone given a "liberal construction in favor of awarding benefits," it is clear that Mr. Alexander is entitled to workers' compensation benefits. As indicated below the vast majority of other jurisdictions and commentators who have considered this issue have come down in favor of compensation.

II

PETITIONER HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE LABOR COMMISSION ORDER AND THUS HAS FAILED IN ITS DUTY ON APPEAL.

If Petitioner wishes to challenge the Labor Commission's Order, it is required to marshal all of the evidence supporting the Agency's Finding and show that, despite supporting facts and all reasonable inferences that can be drawn therefrom, the Findings are not supported by substantial evidence given the record as a whole. Hales Sand and Granite, Inc. v. Audit Division, 842 P.2d 887, 893 (Utah 1992).

The County has utterly failed to do so. Petitioner failed to even mention significant Findings made by the Administrative Law Judge and the Commission.

Many of those omitted Findings are pointed out in Respondent's Statement of Facts above. Although Petitioner does devote a single brief paragraph to a section entitled "Facts Supporting the Commission's Ruling" (Petitioner's Brief p. 8-9) that recitation is not only incomplete, it also completely fails to all include the required "reasonable inferences that can be drawn therefrom."

It is well-established that a party challenging a lower Court or Administrative Agency's Findings of Fact has the burden of establishing that those Findings are not supported by the evidence and thus, are clearly erroneous. See, Utah R. Civ. P. 52(a); Cambelt International Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987). In order to successfully challenge a Trial Court or Administrative Agency's Findings of Fact on appeal, a Petitioner/Appellant must list all the evidence supporting the Findings and then demonstrate that the evidence is inadequate to sustain the Findings, when viewed in a light most favorable to the Court/Agency below. *See*, Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998).

Utah's Courts have stated that the marshaling process is not unlike being the devil's advocate. A Petitioner/Appellant may not merely present selected evidence favorable to his or her position without presenting any of the evidence supporting the lower Court/Agency's Findings. See, Whitear v. Labor Commission, 973 P.2d 982 (Utah App., 1998).

> In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings appellant resists. After constructing this magnificent array of

> supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inventory Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Marshaling the evidence on an appeal is a process fundamentally different from that of presenting their claims at the Hearing. As the Utah Supreme Court explained in Chen v. Stewart, 2004 UT 82, 100 P.3d 1177 (Utah, 2004), in a recent, extensive attempt to reiterate the requirements of marshaling:

> Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position [citing cases]. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact [citing cases]. Furthermore, appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court's findings. Id. at 1195.

The Court went on to emphasize that, "If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone" and "we assume that the evidence supports the trial court's findings." Id. at 1196. *See also*, Merriam v. Industrial Commission, 812 P.2d 447, 450 (Utah Ct. App. 1991); Featherstone v. Industrial Commission, 877 P.2d 1251, 1254 (Utah Ct. App. 1994)

Rather than marshaling all the evidence in support of the Order, the Petitioner has referenced only some of the relevant facts and asserts that this is merely a case in which Mr. Alexander, a non-uniformed officer, was driving his police vehicle prior

to work hours and on a personal errand and, therefore, the accident did not "arise out of and in the course of employment" for purposes of workers' compensation benefits. This is a very constrained reading of the "going and coming" rule, for which police officers enjoy a notable exception.

When an Petitioner/Appellant fails to meet the heavy burden of marshaling the evidence, the Appellate Courts are bound to assume the Record supports the Trial Court/Administrative Agency's factual Findings. In fact, Appellate Courts have shown no reluctance to affirm when the Appellant/Petitioner fails to meet its marshaling burden. *See*, Wade v. Stangl, 869 P.2d 9, 12 (Utah Ct. App. 1994).

As a result of Petitioner's failure to adequately marshal the facts and evidence, its Petition for Review should be dismissed. To rule otherwise would allow any party on appeal to supplant Findings of the lower Court or Administrative Agency with that parties' own purported Findings without marshaling evidence or meeting the substantial evidence test.

III

RESPONDENT WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WHEN INVOLVED IN A CAR ACCIDENT.

A. The "Going and Coming" Rule.

It is not disputed, nor at issue herein, that injuries sustained by an employee are generally not considered to arise out of and in the course of employment for purposes or workers' compensation benefits, in the ordinary situation involving traveling between home and the employment premises, without anything more

involved. VanLeeuwen v. Industrial Commission, 901 P.2d 281, 284 (Utah App. 1995). That, however, is not the fact situation presented here.

The mere fact that an employee is going or coming to his or her work site alone is insufficient to determine that he/she is not entitled to workers' compensation benefits for an injury while so engaged. It is necessary to look beyond the mere "going and coming" and determine the nature and purpose of the trip, the amount of control the employer exercises, and any benefit which may have accrued to the Employer.

Under Utah law, when the activity in which the employee is engaged advances, directly or indirectly, the employer's interests, and the employee is at the place and time where he or she is authorized to perform such activity, the employee is entitled to compensation, even if that activity also advances the employee's own interests, unless any benefit to the employer is negligible. (See cases cited below).

As this Court has explained, that means that the activity must be "[w]hile the employee is rendering services to his employer which he was hired to do or doing something incidental thereto, at the time when and the place where he was authorized to render such service" and "An activity is incidental to the employee's employment if it advances, directly or indirectly, his employer's interests." AE Clevite v. Labor Commission, 996 P.2d 1072, 1075 (Utah App., 2000), *cert. den.* 4 P.3d 1289 (UT 2000).

Examples of cases in which compensation is allowed in such situations are:

clearing a driveway at home, VanLeeuwen v. Industrial Commission, *Supra*; traveling between employer's business locations, State Insurance Fund v. Industrial Commission, 15 Utah 2d 263, 393 P. 2d 397 (1964); driving a semi-truck tractor from home to the employer's business after cleaning and servicing the tractor at home as was the employee's usual practice, Kinne v. Industrial Commission, 609 P. 2d 926 (Utah, 1980); starting a company truck to drive to the terminal after taking it home for the night, Moser v. Industrial Commission, 21 Utah 2d 51, 440 P.2d 23 (1968); driving the company vehicle to work where it would regularly be used, Bailey v. Industrial Commission, 16 Utah 2d 208, 398 P.2d 545 (1965); driving to a post office to pick up the employer's mail before returning to the employer's premises after lunch; Kahn Brothers v. Industrial Commission, 75 Utah 145, 283 P. 1054 (1929); or driving toward home before dropping off materials at a location designated by her employer (although not after the materials have been dropped off). Drake v. Industrial Commission, 939 P. 2d 177 (Utah, 1997).

B. Police Officers on Call.

In this case, both an Administrative Law Judge and the Labor Commission determined that based upon the facts presented to them at the Hearing, that although Mr. Alexander was not formally on-duty at the time of his automobile accident, nevertheless, he was engaged in actions to materially benefit his employer and that such activities create a proper basis for an award of compensation as was made in this case.

Petitioner claims that:

> The Commission has carved out a new exception to the 'coming-and-going rule,' in effect ruling that police officers' injuries arising from automobile accidents involving an agency vehicle are sustained as an accident arising out of and in the course of the employee's employment.

Petitioner's Brief at 7.

Nothing could be further from the case and Respondent Alexander has not advocated such a blanket rule. Although Petitioner cites a prior Labor Commission case (Ross v. Salt Lake City Corporation, Labor Commission Case No. 2003-0958)[1] which did award workers' compensation benefits to an off duty Salt Lake City police officer who was involved in an accident with her agency vehicle, there is nothing to indicate that the Labor Commission has adopted a blanket and hard and fast rule awarding workers' compensation benefits to any off duty police officer who is injured while driving a police vehicle. Rather, both the Ross case and this case demonstrate that the Labor Commission looks at the facts of each case and analyzes those facts to determine whether they meet the legal standard for an injury "arising out of and in the course of the employee's employment."

Petitioner, in its Brief, cites Professor Larsen's well respected treatise on Workers Compensation law for the principle that an employee generally is not covered by workers' compensation benefits while going and coming to his/her place of work. (Petitioner's Brief at 16). Inexplicably, however, Petitioner fails to continue

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[1] Now on appeal as Salt Lake City Corp. v. Labor Commission, Case No. 20050774-CA. Oral argument was held was held before the Utah Supreme Court on this case on June 6, 2006, and a decision is pending.

to cite the treatise for the law and public policy on the specific fact situation raised in this Petition for Review.

Professor Larsen went on to note that the prevalent law regarding police officers injured during commutes, in police vehicles, is that compensation should be awarded. He notes:

> [I]t has been recognized that police officers are 'on call' in a special sense. That is, while the usual on-call employee is subject to the possibility of a specific summons emanating directly from the employer, the police officer may at any moment be 'called' into duty by the events taking place in the officer's presence, whether technically off duty or not. Awards have accordingly been made to officers injured in the course of an ordinary going or coming journey.

Arthur Larson and Lex Larson, Larson's Workers Compensation Law §14.05[7] (Rel. 83-11/99).

Petitioner has acknowledged that "other states have fielded this issue," but then goes on to selectively cite only three cases, which are in the minority, not on point factually, and ignores the overwhelming weight of authority that such injuries are indeed compensable. Petitioner makes no effort to apply those cases to the specific facts herein, or to even explain why the minority view that it cites should be adopted by this Court.

Petitioner's reliance on Ahlstrom v. Salt Lake City Corp., 2002 UT 4, 73 P. 3d 315 (UT 2003) in particular, is misplaced. First, Ahlstrom was not a workers' compensation case, but rather involved an issue of third party liability. The Supreme Court, in that case, was careful to indicate its decision should not be misinterpreted as applying to workers' compensation cases. During the course of its opinion, the

Court explained:

> Attempting to augment the coming and going rule, the Ahlstroms also argue that the "special errand" and "employer-provided transportation" exceptions to the rule should be imported from our worker's compensation jurisprudence and applied to negligence cases like this one. However, cases addressing workers' compensation rules, even when the issues are the same, are of little use in answering the question now before us. Id. at 317.

The Court further emphasized this factor in its footnote to that declaration:

> Although the coming and going rule was imported from our workers' compensation jurisprudence, we note that such portability, while sometimes appropriate, is not the rule in Utah.
>
> Scope of employment questions are inherently fact bound. The scope of employment question arises in both workers' compensation and negligence cases but the method by which the question is answered is markedly different. We have said that the Workers' Compensation Act 'should be liberally construed and applied to provide coverage. Any doubt respecting the right of compensation will be resolved in favor of the injured employee.' . . . Negligence cases require proof by the preponderance of the evidence that the employee was acting within the scope of employment. With very different presumptions governing workers' compensation and negligence cases, it would not be wise to hold that the rules governing scope of employment questions in one area are wholly applicable to the other because the legal effect of identical facts may be different in a negligence case than in a workers compensation case. Id. at 317.

Second, In Ahlstrom, the Utah Supreme Court was called upon to review a Partial Summary Judgment, in which it was required to consider the facts in a light most favorable to Salt Lake City, the party against whom the judgment as to liability had been granted. Conversely, in a workers' compensation case, the law is to be liberally construed in favor of awarding benefits and any doubt as to coverage is to be resolved in favor of the injured worker. (See also Point I above).

In Montgomery County, Maryland v. Wade, 345 Md. 1, 690 A. 2d 990 (Md. App., 1997), the Maryland Court of Appeals considered a program under a "PPV" or "personal patrol vehicle" program, extremely similar to Salt Lake County's. The Court upheld workers' compensation benefits awarded to Officer Wade for injuries sustained while operating her patrol vehicle, with the required equipment, and while monitoring her radio, as required, although she was off duty, not in her uniform, and on her way to her grandmother's house, with her grandmother as a passenger.

As the Court explained, that program placed stringent regulations on those under the program including the obligation that the off-duty officers must:

> [c]arry a handgun, handcuffs, and department credentials, and equip the PPV with items such as flares [etc] . . . They must monitor the police radio, and may make traffic stops 'only when inaction would reflect unfavorably upon the department.' They must 'respond to incidents or calls for service which come to their attention through any of the following means: (1) on view; (2) citizens; (3) radio monitored activity of a serious nature occurring within reasonable proximity to their location.' Id. at 992.

The Maryland Court also noted the restrictions imposed under the program against the use of such vehicles for political purposes, secondary employment, use of bumper stickers, and various other activities, also similar to those imposed in the case presently before this Court.

Based upon those factors, the Court upheld the determination that the injuries arose out of her employment because:

> Officer Wade's use of her PPV . . . was clearly incidental to her role as a patrol officer. The . . . department established a program whereby its officers were permitted to use their patrol cruisers as personal vehicles when not on regularly scheduled duty. It attached numerous and

> detailed regulations to this privilege and encouraged off-duty use of the PPVs in order to, inter alia, alleviate budget and staffing concerns and increase police presence throughout the County. Officer Wade would not have been operating a PPV but for her employment and consequent participation in the program. Thus, because her injuries stem from her use of the PPV within the department's guidelines, the requisite causal link exists, and, under these circumstances, those injuries are properly considered to have arisen from her employment. Id. at 994.

The Court then considered the second part of the question, as to whether she was acting in the "course of employment" at the time of the accident. The Court explained that this required her to be "performing those duties or engaged in something incident thereto" or she may not recover. The Court, again noting the guidelines and strictures imposed upon her by the employer whenever she was operating the PPV off duty, explained:

> The guidelines, in essence, outline additional responsibilities by which the participating officers are to abide upon penalty of, at minimum, expulsion from the program. Any time Officer Wade placed the vehicle in operation while she was not on scheduled duty, she was bound to act within those guidelines. Taking this view, she may, therefore, properly be considered to have been operating the PPV under the auspices of the department at the time of the accident and, thus, within the course of her employment. Id. at 995.

The Court specifically rejected the assertions of the County that the officer was not performing any police duty at the time of, or leading up to the accident and was therefore precluded from recovery by prior state case law. The Court continued:

> Upon entry into the vehicle, Officer Wade was required to abide by the program's numerous regulations. She was required to stop in particular circumstances or in response to calls for service. The duties and responsibilities concomitant to use of a PPV are in addition to those expected of a nonparticipating officer. As in Perry, this fact in no way lessens the work-related nature of a participating officer's use of a PPV.

* * *

> The County seems to intimate that, if the 'work' being performed is not required, injuries sustained in the performance thereof are not compensable, for failing to satisfy the requisite nexus. Certainly, a participating officer is not required to use the PPV while off duty, but the County developed the program precisely for such use in furtherance of its objectives . . . By its assertions and assessment of the compensability of Officer Wade's claim, the County appears affirmatively to disregard the department's motivation in providing the vehicles to the officers in the first instance. This belies traditional analysis of what is considered to be within the course of employment. Thus, while the County may be correct in stating that its off-duty officers are not required to operate their PPV's while off duty, if and when they do, they are performing a police function and should be compensated under the Act for any injuries sustained pursuant thereto." Id. at 997.

Maryland's decision in this regard are not alone. Other states, similarly recognizing the general application of the "going and coming rule," have still awarded officers workers' compensation benefits under similar circumstances.

In Tighe v. Las Vegas Metro. Police Dept. 110 Nev. 632, 877 P. 2d 1032 (Nev., 1994), an undercover officer was injured while driving home after dinner with fellow officers, where they discussed their activities and anticipated future actions. The officer was on call, carrying a police beeper and driving an undercover Metro vehicle equipped with police radio. The Court noted that the "going and coming rule" does not apply under such circumstances to preclude workers' compensation benefits. As the Court explained:

> First, an employee may still be within the course of his or her employment when the travel to or from work confers a distinct benefit upon the employer. . . .Tighe was driving home in his employer's vehicle and was subject to his employer's control at the time of the accident. The police radio and beeper provided a means for Metro to

> summon Tighe in a time of need, and Metro benefitted from having one of its undercover officers driving in an undercover vehicle. . . . (T)here is substantial evidence in the administrative record to find that Tighe's injuries occurred within the course of his employment. Tighe was on call and driving a police vehicle equipped with a police radio, and he was prepared to respond to any public emergency he may have encountered. Id. at 1035.

In City of Springfield v. Industrial Commission, 244 Ill. App.3d 408, 614 N. E. 2d 30 (Ill. App., 1999) benefits were awarded to a uniformed and armed officer injured while returning from lunch at home in an unmarked squad car provided for his use 24 hours a day, with a police radio in the car required to be activated at all times, and with a beeper. The Court explained:

> In this case, although claimant was not responding to any particular call or emergency, he had his police radio activated pursuant to department directive at the time the accident occurred. This serves to distinguish this case from those cited by respondent. . . In this case claimant was returning to duty after lunch and was not only subject to being 'on call'; he had his radio turned on and was 'on call' to the extent he would have responded in the normal course to any request for assistance or emergency he encountered.
>
> In this sense, claimant was not acting outside his employment-related duties or engaged in a purely personal diversion or enterprise. The principal issue, as we have indicated, was whether the employer, under all the circumstances, can be deemed to have retained authority over the employee. Actively monitoring the police radio during the course of claimant's return trip to the station is sufficient evidence upon which the Commission could draw the conclusion that the employer intended to retain authority over claimant at the time his injuries arose. Accordingly, the Commission's decision is not against the manifest weight of evidence. Id. at 480.

During the course of its decision, the Illinois Court found that the earlier Siens v. Industrial Commission, 418 N.E.2d 749 (Ill., 1981) and Wolland v. Industrial

Commission, 434 N.E.2d 1132 (Ill., 1982) cases from that jurisdiction were not applicable because they were not performing any job-related duties at the time of the accident, whereas the officer in the current case was not merely subject to "call" but "had his radio turned on and was 'on call' to the extent he would have responded in the normal course to any request for assistance or emergency he encountered."

In Botke v. County of Chippewa, 210 Mich. App. 66, 533 N.W. 2d 7 (Mich. App., 1995) benefits were awarded to an officer injured while traveling home, in uniform, in radio contact with the department, and driving a fully equipped patrol car. The Court recognized its prior decision in Chambo v. City of Detroit, 269 N.W.2d 243 (Mich. App., 1978) where benefits had been denied. The Court explained, however, that Chambo was decided under "the narrow facts" of that case. The Court then explained:

> The facts of the present case support the contrary conclusion. At the time of this accident, defendant Chippewa County clearly received a benefit from plaintiff's operation of the county's only active on-road patrol vehicle. Although the road traveled by plaintiff was mostly rural in character, the county received the benefit of deterrence of traffic violations by virtue of the presence of the marked patrol vehicle. Furthermore, although plaintiff was officially off duty, he was expected to respond to any incidents observed by him that necessitated law enforcement intervention. He remained in radio contact with defendant and was subject to immediate dispatch. Under these circumstances, we hold that the dual-purpose rule applies . . . Id. at 8.

In State of Delaware v. Glascock, 1997 DE 18262 (Superior Ct, Sussex, 1997) death benefits were awarded for an Internal Affairs investigator for the Department of Corrections who was killed driving home in a state owned vehicle

equipped with a cellular phone and state police radio, which he was only allowed to use for work and driving to and from home. The Court explained that the going and coming rule did not bar that recovery and explained that, while it was not certain where he was headed at the time of the accident, even if he was heading home the recovery was still not barred because he:

> [W]as subject to unanticipated disruption at any time by the demands of his job. In addition to always wearing a beeper, he drove a State-owned car with a police radio only when driving to and from work or when responding to a call. The presence of the police radio made him even more accessible to the Employer when he was going to or coming from work. . . . The combination of these factors makes it clear that the relationship between Glascock's on-call responsibilities and his employment was sufficiently close to support the Board's finding that Glascock was in the course of his employment at the time of his death. Id. at 84.

In John Collier v. County Nassau, 1974 N.Y. 44576, 362 N.Y.S. 2d 52 (N.Y. APP, 1974) benefits were awarded to a police sergeant injured while a passenger with two other policemen in a police vehicle assigned to his unit. It was used for an extended period to travel between home and department, and he was often called to drive from home to a particular assignment area. The Court explained:

> Where the use of the employer's vehicle has been used by the employee over a period of time with the employer's consent and for the employer's benefit, the operation of the vehicle was directly related to the employment, and any injury occurring during such operation does arise out of and in the course of his employment. Id. at 53.

In City of Sherwood v. Lowe, 4 Ark. App. 161, 628 S.W. 2d 610 (Ark. App., 1982) benefits were similarly awarded to an officer for injuries received off-duty when he was armed and in uniform but off-duty, operating his personal motorcycle

equipped with police lights within his jurisdiction, even despite the absence of a police radio. The Court explained:

> The City of Sherwood derived a benefit from his presence on the city streets in uniform and operating the police-equipped vehicle. This benefit is not so tenuous as to require denial of coverage by workers' compensation. Id. at 615.

In Carrillo v. Workers Compensation Appeals Board, 197 Cal. Rptr. 425, 149 Cal. App.3d 1177 (Cal. App., 1983), the denial of an award of benefits was annulled by the Court with directions to grant the Petition for Reconsideration. There, a reserve officer was injured while driving to work from home in her private car, in her sheriff's uniform and badge, but without a sidearm, which would otherwise have been required to be locked up when she arrived at the Women's Honor Farm. The Court explained:

> If petitioner had observed any police matter other than a traffic infraction while driving to or from work, she was required by her employer's regulation to take appropriate action. Since petitioner was in full uniform, criminals as well as citizens in need of assistance would know upon observation that she was a law enforcement officer. Id. at 427.

Finally, In Mineral County v. Industrial Commission, 649 P.2d 728 (Colo. App., 1982) the Court upheld a Commission decision awarding benefits, despite arguments that the "to and from work" rule barred recovery, for an officer who drove to a restaurant in his official car, in uniform, after serving some papers, stopped for a short period at the Elk's club and was subsequently found lying on the sidewalk in front of the club's steps. The Court acknowledged it had previously stated in Rogers

v. Industrial Commission, 574 P. 2d 116 (Colo. App., 1978), that the officer's injuries were not compensable because "[t]he controlling factor is whether, at the time of the accident, the officer was actually engaged in the performance of law enforcement activities."

However, the Court declared that "Rogers is distinguishable from the instant case" because of the "totality of the circumstances," including the fact that he was in uniform and was returning to his official car furnished by the employer, as well as the fact that he was the only member of that County's sheriff's department and could even be reached at home by sheriff's radio or telephone at any time of the day or night.

Petitioner repeatly makes the claim that at time of his accident Mr. Alexander was "... no different from the thousands of commuters enduring Salt Lake County rush-hour in their drive to work" and that "The only connection the Sheriff's Office that Alexander had at the time of the accident was that he was occupying a Sheriff's Office vehicle." (Petitioner's Brief at 6). In order to make this naive assertion, Petitioner has to overlook substantial evidence found by the Labor Commission.

The fact is that on the date in question, Mr. Alexander was far different from the other commuters. He was a sworn and highly trained Sheriff's Officer with approximately 28 years of experience. He was required by Salt Lake County to be monitoring the official police radio and to respond to violations of the law and emergencies. He had, in fact, done so on several occasions in the past. He was on-

call, ready for action.

He was not a private citizen driving his private vehicle. He was in an unmarked, but official Salt Lake County Sheriff's vehicle. The vehicle was fully equipped as a police car with a siren, deck lights and a police radio. It was also equipped with a rifle, shotgun and a handgun. Mr. Alexander was required to wear or keep in the vehicle his Sheriff's Office identification, uniform and citation book, all of which he had. He was not free to use the vehicle, like any private citizen could their own personal vehicle, as Salt Lake County imposed strict controls on where, when and how the vehicle could be used.

For example, only Mr. Alexander was authorized to operate the vehicle. It could not be driven outside of Salt Lake County. He could not use the vehicle for recreational or vacation trips or for any other purpose or activity which would be inconsistent with the Officer's obligation to respond to emergencies. He could not use the vehicle if he, or any passenger had consumed alcohol within the previous six hours. In addition, even his clothing and grooming while driving the vehicle was controlled, with restrictions on certain attire and "day old beards."

A Sheriff's vehicle was not provided to Mr. Alexander by Salt Lake County out of largess or as a fringe benefit of his employment. Rather, the County derived a significant benefit, supported by sound public policy, by having its Officers constantly driving fully equipped Sheriff's vehicle and available to respond to calls at a moments notice. Through this Policy, the County benefitted from having an

increased number of Officers on the streets, faster response time and greater police availability, as well as the benefit of having an unmarked car on the road - an advantage in certain situations.

Under these facts, Mr. Alexander was hardly like the "thousands of commuters enduring Salt Lake County rush-hour in their drive to work." His special on-call status as a police officer, the nature and type of vehicle he was operating and the control and obligations imposed upon him by Salt Lake County all operate to take him out of the general "going and coming" rule and bring him within the purview of the Workers Compensation Act.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Mr. Alexander's injuries were suffered in the course and scope of his employment with the Petitioner. He was engaged in actions which materially benefitted his employer and such activities created a proper basis for the award of compensation as was made in this case. The Order of the Utah Labor Commission below, should be affirmed.

DATED this 21st day of June, 2006.

Brian Kelm
Counsel for Steven A. Alexander

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2006 a copy of the foregoing BRIEF OF RESPONDENT STEVEN A. ALEXANDER was hand-delivered and/or mailed, as follows:

UTAH COURT OF APPEALS 450 South State Street - 5TH Floor P.O. Box 140230 Salt Lake City, Utah 84111-0230	(1) original and (7) copies
Mr. T.J. Tsakalos Deputy Salt Lake County Attorney 2001 So. State Street, Suite S3400 Salt Lake City, UT 84190	(2 copies)
Mr. Alan L. Hennebold UTAH LABOR COMMISSION Post Office Box 146600 Salt Lake City, Utah 84114-6600	(1 copy)
File Copy	(1 copy)

Brian Kelm
Counsel for Steven A. Alexander

Addendum A

Utah Code Annotated, § 34A-2-401 (1999)

34A-2-401. Compensation for industrial accidents to be paid.

(1) An employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:

(a) compensation for loss sustained on account of the injury or death;
(b) the amount provided in this chapter for:
(i) medical, nurse, and hospital services;
(ii) medicines; and
(iii) in case of death, the amount of funeral expenses.

(2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:
(a) on the employer and the employer's insurance carrier; and
(b) not on the employee.
(3) Payment of benefits provided by this chapter or Chapter 3, Utah Occupational Disease Act, shall commence within 30 calendar days after any final award by the commission.

Amended by Chapter 55, 1999 General

Addendum B

Order Denying Motion for Review
Appeals Board
Utah Labor Commission
February 13, 2006

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
P. O. Box 146615
Salt Lake City, Utah 84114-6615
TELEPHONE 801-530-6800

STEVEN A. ALEXANDER, Petitioner, vs. SALT LAKE COUNTY, Respondent.	*	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 200389 Judge Lorrie Lima

The above-entitled matter was heard before Debbie L. Hann, Administrative Law Judge, Utah Labor Commission, on October 23, 2003. The petitioner was represented by Brian Kelm, Esq. The respondent was represented by John Soltis, Esq. and T.J. Tsakalos, Esq.

Gn ff_p

STATEMENT OF THE CASE

The petitioner, Steven A. Alexander, filed an Application for Hearing with the Utah Labor Commission on January 9, 2003, and claimed entitlement to medical expenses, recommended medical care, temporary total compensation, permanent partial compensation, travel expenses and interest. The petitioner's claim for workers compensation benefits arose out of an alleged industrial accident that occurred on November 7, 2001. The respondent's denied that the accident on November 7, 2001, arose out of and in the course of the petitioner's employment.

On April 16, 2004, Judge Hann issued a Findings of Fact and Interim Order and referred the issue of medical causation to a Labor Commission medical panel. On August 12, 2004, the medical panel issued a report. A copy of the medical panel's report was mailed to the parties. No party filed an objection to the report and it is admitted into the evidence pursuant to Utah Code Ann. §34A-2-601.

FINDINGS OF FACT

1. Employment.

The petitioner was employed by the respondent as a deputy sheriff in the Salt Lake County Sheriff's Office. On November 7, 2001, the petitioner's average weekly wage was $1,338.50. He was married with one dependent child. The petitioner's weekly workers compensation rate was $554.00 for temporary total compensation and $369.00 for permanent partial compensation.

2. Respondent's Policy Regarding Sheriff's Office Vehicles.

The Salt Lake County Sheriff's Office issued a written policy setting forth regulations governing vehicles issued to deputy sheriffs. Exhibit R-12. The policy stated in part that:

> Travel time will not be counted as time worked. This does not relieve a sworn employee from an obligation to check on the air or respond to a law enforcement situation. . . . 2-5-03.03(1)(4).
>
> **********
>
> Office vehicles and equipment are issued to members for the use in the performance of their duties. It is the obligation of all members exercising control of these assets to safeguard them and use them within the limits of policy and good judgement. 2-8-01.00.
>
> *********
>
> Deputy Sheriffs . . . assigned Sheriff's Office vehicles are subject to the following restrictions:
>
> (a) Vehicles will not be used for recreational or vacation trips.
>
> (e) Vehicles will not used for activities manifestly inconsistent with the obligation to respond to emergencies, such as heavy loads, objects protruding from windows or trunk, etc.
>
> (f) Vehicles may not be used for secondary employment purposes, except as transportation to and from the work site, except as otherwise authorized by Sheriff's Office policy. 2-8-02-04(2).
>
> **********
>
> Deputies will carry the following equipment with them in the vehicle at all times:
>
> (a) an authorized firearm.
>
> (b) Sheriff's Office identification.
>
> (c) a flashlight
>
> (d) a Utility Uniform
>
> (e) a citation book and
>
> (f) flares.
>
> 2-8-02.04(4).

Dr. Beck released the petitioner to light duty on July 23, 2002, and he determined that the petitioner was medically stable on February 11, 2003. Medical exhibit 321 and 329. On June 30, 2003, Dr. Beck assigned to the petitioner's right shoulder a four percent whole person impairment rating. Dr. Beck apportioned 50% of the petitioner's impairment to his pre-existing condition, or two percent whole person, and two percent whole person due to the November 2001, motor vehicle accident. Medical exhibit 331.

In a September 17, 2002, letter to Salt Lake County Risk Management, Dr. Beck noted the petitioner's right shoulder symptoms significantly worsened following the November 2001, motor vehicle accident. He opined that at least 50% of the petitioner's right shoulder condition was the result of the accident. Medical exhibit 325-326.

On September 22, 2003, Dr. Richard Knoebel conducted an independent medical evaluation of the petitioner. Dr. Knoebel opined the petitioner's November 7, 2001, motor vehicle accident was not the cause of his right shoulder condition. Dr. Knoebel based his opinion, in part, on the petitioner's delay in seeking medical treatment following the accident. Dr. Knoebel assigned to the petitioner's right shoulder a five percent upper extremity impairment rating. Medical exhibit 358-370.

On October 14, 2003, Dr. Ronald Ruff performed a review of the petitioner's medical records for the respondent. Dr. Ruff noted that "...it is impossible to say that these shoulder problems were not exacerbated by the accidents." Medical exhibit 356.

On June 2, 2004, the Labor Commission medical panel opined that, in terms of reasonable medical probability, there was a medically demonstrable causal connection between the petitioner's right shoulder condition and the motor vehicle accident on November 7, 2001. The medical panel further opined the treatment the petitioner received for his right shoulder condition since November 7, 2001, was reasonable and necessary to treat his injury due to the motor vehicle accident. The medical panel assessed to the petitioner's right shoulder condition a five percent permanent physical impairment rating. It apportioned two percent whole person, of the impairment rating, to the petitioner's pre-existing condition and three percent whole person to the November 7, 2001, motor vehicle accident. The medical panel concluded that the petitioner was not malingering and he had a normal mental status.

6. Temporary Total Compensation.

It is undisputed that the petitioner missed work due to his right shoulder condition. The petitioner had right shoulder surgery on March 6, 2002, and he returned to work on August 6, 2002.

DISCUSSION AND CONCLUSIONS OF LAW

1. The November 7, 2001, Accident and Scope of Employment.

Section 34A-2-401(1) of the Utah Workers' Compensation Act provides that an employee who is injured by accident "arising out of and in the course of the employee's employment . . . shall

be paid compensation." Travel to and from work is not generally considered to be "in the course of . . . employment." *Soldier Creek Coal Co. v. Bailey*, 709 P.2d 1165 (Utah 1985).

In *Whitehead v. Variable Annuity Life Insurance Co.*, the Court of Appeals cited the Utah Supreme Court and held:

> The major premise of the going and coming rule is that it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has not control and from which it derives no benefit. Therefore, the major focus in determining whether or not the general rule should apply in a given case is on the benefit the employer receives and his control over the conduct.

In the present case, the preponderance of the evidence demonstrates the respondent's policy imposed substantial control and obligation on the petitioner both on and off duty. Although the policy allowed the petitioner to use his assigned sheriff's vehicle when off-duty, he could not use it for recreational or vacation trips or secondary employment, other than to and from the work site. The policy required the petitioner to monitor the police radio when operating the vehicle and respond to a law enforcement situation even if he was not on duty. On the day of the motor vehicle accident, the petitioner was dressed for work and he carried the mandated sheriff's equipment in the vehicle. The petitioner operated the vehicle as the policy proscribed including monitoring the sheriff's radio in the areas he traveled. Finally, the petitioner provided a visual law enforcement presence in the local community. The sheriff's vehicle was an instrumentality of the Sheriff's Office at all hours of the day and night when the petitioner operated it. Thus, the petitioner was performing for his employer a substantial service required by the respondent's policy.

Based on the foregoing, the petitioner suffered an accident arising out of and in the course of his employment. The benefit the petitioner provided to the respondent was substantial both on and off duty when he operated his assigned sheriff's vehicle. Furthermore, the respondent had substantial control in the manner in which the petitioner operated the sheriff's vehicle both on and off duty.

2. Medical Causation of Petitioner's Right Shoulder Condition.

The preponderance of the evidence demonstrates that the petitioner sustained a preexisting injury to his right shoulder in fall 2000, for which he received medical treatment. Therefore, the petitioner is held to a higher legal standard under *Allen v. Industrial Commission*.

The preponderance of the evidence demonstrates that on November 7, 2001, the petitioner was involved in a severe industrial accident when sheriff's vehicle that he was driving was rear ended on a freeway. A medical demonstrable causal connection existed between the petitioner's right shoulder condition and the industrial accident on November 7, 2001. The medical treatment the petitioner received for his right shoulder condition since November 7, 2001, was reasonable and necessary to treat his right shoulder condition due to the industrial accident.

Based on the foregoing, the petitioner suffered an injury that was caused by an industrial accident on November 7, 2001.

3. Temporary Total Compensation.

The petitioner missed a total of 21.6 weeks of work due to the industrial injury he sustained on November 7, 2001.

4. Permanent Partial Compensation.

The preponderance of the evidence, based on an impartial medical panel, demonstrates that the petitioner suffered a five percent whole person physical impairment of his right shoulder. Two percent of the five percent whole person rating was apportioned to the petitioner's pre-existing condition. Three percent of the five percent whole person rating was apportioned to the petitioner's industrial accident.

5. Travel Expenses.

The petitioner provided no evidence concerning his travel expenses associated with the medical treatment for his industrially caused injuries.

ORDER

IT IS THEREFORE ORDERED that the respondent shall pay the petitioner temporary total compensation at the rate of $554.00 per week for 21.6 weeks, for a total of $11,966.40, less attorney's fees to Brian Kelm, pursuant to Utah Code Ann. §34A-2-410. That amount is accrued, due and payable in a lump sum, plus interest at eight percent (8%) per annum, pursuant to Utah Code Ann. §34A-2-420(3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that the respondent shall pay the petitioner permanent partial compensation for a three percent impairment rating at the rate of $369.00 per week, for 9.36 weeks, for a total of $3,453.84, less attorney's fees to Mr. Kelm, pursuant to Utah Code Ann. §34A-2-412. That amount is accrued, due and payable in a lump sum, plus interest at eight percent (8%) per annum, pursuant to Utah Code Ann. §34A-2-420(3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that the respondents shall pay all medical expenses reasonably related to the petitioner's industrial accident of November 7, 2001, pursuant to Utah Code Ann. §34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission, and any travel allowances hereinafter incurred, pursuant to Utah Administrative Code, Rule 612-2-20, plus interest at eight percent (8%) per annum, pursuant to Utah Code Ann. §34A-2-420(3) and Utah Administrative Code, Rule 612-2-13.

IT IS FURTHER ORDERED that the respondents shall pay the statutory attorneys' fees of $3,084.05, plus twenty percent (20%) of the interest awarded herein, directly to Mr. Kelm pursuant to

Utah Code Ann. §34A-1-309 and Utah Administrative Code, Rule 602-2-4. That amount shall be deducted from the petitioner's award and sent directly to the office of Mr. Kelm.

IT IS FURTHER ORDERED that the petitioner's claim for travel expenses is dismissed with prejudice.

DATED THIS 22nd day of February 2005.

UTAH LABOR COMMISSION

LORRIE LIMA
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on February 21, 2005, to the persons/parties at the following addresses:

Brian Kelm Esq
350 S 400 E Ste 122-W
Salt Lake City UT 84111

John P. Soltis
2001 So State St Suites S 3400
Salt Lake City UT 84190

T J Tsakalos
2001 So State St Suites S 3400
Salt Lake City UT 84190

UTAH LABOR COMMISSION

Clerk, Adjudication Division
PO Box 146615
Salt Lake City, UT 84114-6615

Addendum C

Salt Lake County Policy 2-8-00.00
"Vehicles and Equipment"

CHAPTER EIGHT

2-8-00.00 VEHICLES AND EQUIPMENT

2-8-01.00 GENERAL RESPONSIBILITIES

(1) Office vehicles and equipment are issued to members for use in the performance of their duties. It is the obligation of all members exercising control of these assets to safeguard them and use them within the limits of policy and good judgement.

(2) Any member who is responsible for the loss, theft, or destruction of Office vehicles and equipment, beyond normal usage, due to the member's misconduct, incompetence, or negligence may be disciplined.

(3) Members will not alter or attach equipment to the existing wiring system. Changes in uniform wiring may only be done with the authorization of the member's Division Commander and the concurrence of the Communications Division Commander. Unauthorized changes may result in discipline.

(4) Window tinting beyond factory specifications is not permitted except in circumstances where investigative needs require same. Approval for tinting must be approved by the members Division Commander.

2-8-02.00 VEHICLES

2-8-02.01 Vehicle Unit Number

(1) All Office vehicles are assigned "unit numbers" for identification purposes.

(2) Unit numbers shall be used whenever identification of the vehicle is necessary.

2-8-02.02 Fuel

State of Utah Fuel Network

(1) To obtain fuel, each vehicle has been assigned a "gas card". Each individual fuel user has been assigned a "P.I.N. Number". Fuel may be obtained by following the directions at the terminal of any State of Utah Fuel Network station. A list of authorized stations is available from the Sheriff's Fleet Management Unit.

(a) Any questions or problems with the fuel system may be directed to 1-800-678-3440 or 1-801-538-3440, 24 hours a day, 7 days a week.

(2) Other Fuel Services

(a) Emergency purchase of gas or oil will be paid for by the member and a receipt obtained for petty cash reimbursement.

(b) The State of Utah Fuel Network Gas Card may be used outside the County consistent with SOPPM 2-8-02.04. Authorized stations are listed in the State of Utah Fuel Network pamphlet. The pamphlet is available from the Sheriff's Fleet Management Unit.

2-8-02.03 Washing Vehicles

(1) Office vehicles will be kept clean and orderly. Members shall, however, use good judgement and wash cars only as frequently as is actually necessary.

(2) Designated commercial car washes will be used.

2-8-02.04 Use of Vehicle

(1) All use of Sheriff's Office vehicles will be consistent with provisions of this policy.

(2) Deputy Sheriffs and other members who are assigned Sheriff's Office vehicles are subject to the following restrictions:

(a) Vehicles will not be used for recreational or vacation trips.

(b) Vehicles will not be used outside Salt Lake County without Division Commander approval.

(c) Vehicles will not be used outside Utah without the Sheriff's and County Commission approval.

(d) Vehicles will not be used by deputies or passengers who are legally intoxicated or have consumed alcoholic beverages in the previous 6 hours. No alcoholic beverage will be transported except for official business.

(e) Vehicles will not be used for activities manifestly inconsistent with the obligation to respond to emergencies, such as heavy loads, objects protruding from windows or trunk, etc.

(f) Vehicles may not be used for secondary employment purposes, except as transportation to and from the work site, except as otherwise authorized by Sheriff's Office policy.

(g) Vehicles will only be operated by authorized Sheriff's Office members.

(3) Members are responsible for the proper care of an assigned Sheriff's Office vehicle. Maintenance of assigned vehicles by Fair Labor Standards Act (FLSA) non-exempt employees will be made on-duty, whenever practical.

(4) Deputies will carry the following equipment with them in the vehicle at all times:

(a) an authorized firearm

(b) Sheriff's Office identification

(c) a flashlight

(d) a Utility Uniform

(e) a citation book, and

(f) flares.

(5) When off-duty, deputies may dress appropriate for their activities. If such dress is inappropriate to represent the Office in an emergency response, the Utility Uniform will be worn.

(a) Deputies shall not dress in any way that could bring discredit to the Sheriff's Office, i.e. tank tops, reversed ball caps, earrings, day old beards, etc.

(6) When using Sheriff's Office vehicles off-duty, deputies will keep the police radio on and monitor radio traffic. If in the vicinity of an in-progress crime or other emergency, the deputy will respond. The deputy will notify Dispatch of such response. Such responses will be made without non-peace officer passengers.

(7) Off-duty deputies will park and operate Sheriff's Office vehicles legally and will be responsible for any citation received.

(8) Unattended vehicles will be kept locked at all times All weapons will be removed from the vehicle while it is being serviced.

(9) Deputies on vacation leave in excess of 5 days, restricted duty, leave without pay, or suspension will coordinate the use of Sheriff's Office vehicles with their Division Commander.

(10) When radio transmissions are required, and the deputy does not have a car number, the deputy's MIS number will be used.

2-8-02.05 Seat belts, Air bags and Transporting Passengers

(1) Seat belts

Members are required to wear seat belts at all times when operating or riding in County vehicles. Members are required to insure that all passengers, including persons in custody, are seat belted when in County vehicles.

(2) Air bag Guidelines

(a) Drivers should wear the seat belt correctly, position themselves approximately 12 inches back from the steering wheel, and keep hands to the sides of the steering wheel at the 9 o'clock and 3 o'clock positions.

(b) Adult passengers seated in the front seat should wear the seat belt correctly, and position the seat as far back as it will adjust to.

(c) Children should ride properly restrained in the back seat whenever possible. Rear facing child seats should never be used in the front seat of a car equipped with a passenger side air bag. All child seats are best used in the rear seat. If a forward facing child seat must be used in the front seat, it should be properly secured and the seat should be moved all the way back. If older children (not using a child restraint device) must ride in the front seat, make sure they are always properly belted and the seat is moved back as far as possible.

2-8-02.06 Inspections

Division Commanders or immediate supervisors shall inspect the vehicles assigned under their command or supervision on a monthly basis, using the Vehicle Inspection Report.

2-8-02.07 Preventative Maintenance (PM)

(l) The manufacturers of Office vehicles give instructions in warranties that these vehicles must be maintained according to a specified schedule.

(a) Patrol vehicles will be PM'd every 3000 miles.

(b) Other vehicles will be PM'd every 4000 miles or three months.

(2) When the vehicle is serviced, a sticker will be placed in the vehicle indicating the due date of the next PM.

(3) PM servicing is the responsibility of the assigned member. If a vehicle is driven by two or more members, the day shift member will be responsible.

(4) Vehicles shall be safety and emission control inspected annually in compliance with State law.

2-8-02.08 Vehicle Repair

(1) Vehicle Maintenance shall supervise the repair of Sheriff's Office vehicles.

(2) When repair needs are detected in a vehicle, the assigned member will notify Vehicle Maintenance and arrange for the vehicle to be received by Public Works.

(3) This shall be the responsibility of the day shift member in situations where the car is assigned to two or more members.

(4) When a vehicle has been repaired, Vehicle Maintenance will test the vehicle and will thereafter notify the member that the unit is available. If the vehicle is a Patrol unit, the supervisor will be notified instead of the member.

(5) When emergency repairs are required and are obtained, Vehicle Maintenance will be notified by memorandum.

2-8-02.09 Wrecker Use

(1) Towed County vehicles will be delivered to Public Works.

(2) Dispatch will call a wrecker contracted to tow County vehicles. If a wrecker is not immediately available, the supervisor shall make arrangements to store the vehicle in a safe place until such time as the wrecker is available.

(3) If the County contract wrecker is not available and the County vehicle must be towed from the scene, it may be picked up by a close commercial wrecker and stored until picked up by the County wrecker, as authorized by the supervisor.

2-8-02.10 Line Units

When a member needs a replacement vehicle because of repairs, etc., a line-car may be checked out from Public Works, if available.